Supreme Court
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

MILTON LEE LEVERETTE,
Petitioner,

v.

LOUISVILLE LADDER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May Mississippi delegate to private manufacturers the authority to make private law and to legislate the "law of the case" for determining whether or not their products are defective?

PARTIES TO THE PROCEEDING

Petitioner

Milton Lee Leverette is an individual and has no corporate affiliations.

Respondent

Louisville Ladder Company

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 183 F.3d 339 (5th Cir. 1999). A copy of opinion is included in the Appendix at Appendix A at 1a - 5a. The order of the District Court for the Southern District of Mississippi is not published. The District Court ordered entry of the Final Judgment on July 15, 1998, (filed July 17, 1998) which is printed in Appendix B at 6a - 7a. Leverette's Motion for Reconsideration filed before the District Court is printed in Appendix D at 10a - 13a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on July 9, 1999. On July 23, 1999, Petitioner filed a Petition for Rehearing which the United States Court of Appeals denied on September 3, 1999. This Petition for Writ of Certiorari is filed within ninety (90) days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sections 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment 14

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Mississippi Constitution 1892, Article 4, Section 33

"The legislative power of this state shall be vested in a Legislature which shall consist of a Senate and a House of Representatives."

Mississippi Constitution 1892, Article 4, Section 88

"The Legislature shall pass general laws, under which local and private interest shall be provided for and protected and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered; and all such laws shall be subject to appeal or amendment."

Mississippi Constitution 1892, Article 4, Section 90

"The Legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz: (s) regulating the practice in courts of justice."

Section 11-1-63 Miss. Code Ann. (1972, as amended)

> That the manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:
>
> (i)(1) The product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the

same manufacturing specifications. (Emphasis by this writer)

STATEMENT OF THE CASE

The facts in this case as pertinent to this petition are not in dispute. Milton Lee Leverette was injured on March 23, 1995, when the year old Louisville ladder upon which he was standing broke causing him to fall thirty (30) feet to the ground and sustain severe and permanent injury.

On February 26, 1997, Leverette filed his Complaint against Louisville Ladder Company in the Circuit Court of Warren County, Mississippi, which matter was removed to the United States District Court for the Southern District of Mississippi on March 20, 1997.

On June 8-9, 1998, the matter proceeded to trial before the District Court. At trial, Leverette called as an expert witness Dr. Shelby Thames, who testified in the field of polymer science. At the conclusion of Dr. Thames' testimony, the District Court, noting that Dr. Thames was of the opinion that the ladder in question was defective because the polymer resins of the ladder had failed to properly adhere to the fiberglass reinforcing portions of the ladder and, further, that this defect had occurred during the manufacturing process and that the condition of the ladder presented an unreasonably dangerous condition to Lee Leverette and any other user of the ladder, entered its order excluding from the evidence the testimony of Dr. Thames on the basis that his opinion did not contradict the Defendant's position that the ladder in question was manufactured to and conformed to all ANSI standards. It was at this point in time that Leverette for the first time was made aware of the Court's interpretation of

the provisions of Section 11-1-63(a)(i)(1) Miss. Code Ann. (1972, as amended).

On June 11, 1998, prior to entry of the District Court's order of July 15, 1998, dismissing his Complaint, Leverette filed a Motion to Reconsider specifically raising before the lower court and allowing it the opportunity to review and pass upon the constitutionality of Section 11-1-63, supra.

On July 17, 1998, the District Court filed its order dismissing the Complaint whereupon Leverette filed his Notice of Appeal with the United States Court of Appeals for the Fifth Circuit on July 23, 1998.

On July 9, 1999, the Fifth Circuit Court of Appeals affirmed the District Court's judgment. Petitioner's request for review was denied on September 3, 1999.

ARGUMENT FOR GRANTING THE WRIT

On March 23, 1995, Lee Leverette was seriously and permanently injured when the new Louisville ladder upon which he was standing broke causing a thirty (30) foot fall to the ground. Leverette received injuries to his shoulder, back and abdomen which necessitated two (2) surgical procedures and also caused two (2) herniated discs in his back. The recommended back surgery could not be performed because Leverette could not pay the cost thereof. Leverette now has a permanent morphine dosepak implant in his body to help with the extensive pain still caused by his back injury. At trial, Leverette's medical bills were $115,000.00.

Dr. Shelby Thames, Research Professor and head of the Polymer Science Department at the University of Southern

Mississippi, testified for Leverette in the field of polymer science. Dr. Thames explained that the fiberglass ladder was a polymer product and that he was therefore eminently qualified to express an opinion as to its makeup and any defects which may have caused or contributed to the failure of the ladder on March 23, 1995.

Dr. Thames, author of over 200 articles in the field of polymer science, and accepted as an expert witness in the courts of Mississippi, California, Oregon, Missouri, Texas, Arizona, Minnesota, Kansas, the United States District Court for the Southern District of Mississippi, and all Mississippi state courts, testified that he examined the ladder under an electron scanning microscope which revealed that there was improper adhesion between the resin portion and fiberglass portions of the ladder. Dr. Thames testified that this electron microscope testing showed without doubt that there was no adhesion between the fiberglass strand portion and the resin portion of the ladder and that the ladder suffered from improper "wedding" of the polymer to the fiberglass and that this caused a defect in the ladder. Dr. Thames testified that this defect caused the ladder's premature failure and that this defect occurred during the manufacturing process. The ultimate opinion expressed by Dr. Thames was that the ladder upon which Leverette was standing fell because of an improper adhesion of the polymer to the fiberglass and that this defect caused the sudden and complete failure of the ladder without warning.

At trial, Louisville Ladder testified that it did not use the testing methods utilized by Dr. Thames and was totally unaware of such methods and only became aware of these standards after it reviewed Dr. Thames' tests. Dr. Thames did not test the ladder to determine whether it met ANSI standards as this was not his objective. Dr. Thames'

objective, one which he met, was to determine in fact why the ladder had failed and broken under Lee Leverette's weight. Dr. Thames testified that it was impossible to test the ladder in question according to ANSI standards because ANSI standards requires destruction of any ladder being tested by these standards.

At trial Louisville Ladder presented evidence that its ladders were manufactured to ANSI standards and that the ladder in question met ANSI standards. On this basis and on the basis that Dr. Thames did not testify regarding ANSI standards, the District Court excluded the testimony of Dr. Thames from evidence and without this testimony Leverette could not prove his case.

On the basis that the case was not a design defect case, the District Court ruled that the testimony of Dr. Thames was excludable because of the terms of Section 11-1-63(a)(i)(1) Miss. Code Ann. (1972, as amended), which provides:

> That the manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:
>
> (i)(1) The product was defective because it deviated in a material way from the manufacturers specifications or from otherwise identical units manufactured to the same manufacturing specifications. (Emphasis by this writer)

Thus, because the lower court ruled that since Louisville Ladder manufactured the ladder in question in

accordance with its own specifications that Dr. Thames' testimony was excludable under the provisions of Section 11-1-63(a)(i)(1), supra.

The District Court's interpretation of 11-1-63(a)(i)(1) allows an unlawful delegation of the legislative authority of the State of Mississippi. It creates a checkerboard pattern of standards for consumers who use fiberglass ladders.

This code section allows each individual manufacturer to select the standards to which its particular product will be manufactured. Provided the product actually manufactured does meet the standards selected by the manufacturer, the manufacturer cannot be held liable. This delegates legal authority to individual manufacturers not possessed by the State of Mississippi or even by the United States.

Even government standards, which may be admissible into evidence, are not dispositive as to whether or not a given product is defective.

The Michigan court in Owens v. Allis-Chalmers Corp., 326 N.W. 2d 372 (Mich. 1982) has held that while compliance by a manufacturer with governmental standards is admissible evidence, it is not conclusive as to whether or not the particular product in question is defective.

Likewise, the South Dakota court in Zacher v. Bud Co., 396 N.W. 2d 122 (S.D. 1986) has ruled that while governmental standards might constitute minimum standards, they are not conclusive as to whether or not a particular product is or is not defective.

The New York court in Lugo v. LJN Toys, Ltd., 539 N.Y.S.2d 922 (Supp. Cut. App. Div. 1st Dept. 1989) has also

held that compliance with governmental standards, while having some evidentiary value, does not absolve a manufacturer of liability.

The courts of the United States have also adopted the same rule. The Fifth Circuit Court of Appeals in Lorenz v. Celotex Corp., 896 F.2d 148 (5th Cir. 1990) ruled that compliance with governmental standards does not insulate a products liability defendant or preclude a finding of liability.

The Tenth Circuit Court of Appeals in O'Gilvie v. International Playtex, Inc., 821 F.2d 1438 (10th Cir. 1987) has likewise ruled that compliance with govemmental standards is not conclusive on the issue of liability.

The District Court, and the Fifth Circuit Court of Appeals, have held that since Louisville Ladder decided to manufacture its ladders to comply with ANSI standards and since they did so that this compliance is the alpha and omega on the defect. The anomaly is that had Louisville Ladder instead complied with standards selected by a governmental body that this would not be conclusive on the issue of defectiveness.

The Fifth Circuit Court of Appeals has attempted to sidestep this constitutional issue by stating that it had not been raised for consideration by the District Court. This is simply incorrect. Immediately upon realizing the District Court's interpretation of 11-1-63(a)(i)(1), supra, Leverette filed his Motion to Reconsider on June 11, 1998, plainly presenting the unconstitutionality issue to the lower court prior to entry of its Final Order of Dismissal on July 15, 1998.

Section 11-1-63(a)(i)(1) supra, grants unto Louisville Ladder, and all other manufacturers, a power not enjoyed by

the United States Government, i.e. the power to select absolute standards by which consumer products will be judged. This constitutes an unlawful delegation of the legislative authority of the State.

Under the reasoning of the District Court, adopted by the Fifth Circuit Court of Appeals, because Louisville Ladder chose to manufacture the particular ladder in question to ANSI standards, the ladder cannot be defective when it breaks under a consumer's body weight if the failure is not related to ANSI standards. Louisville Ladder can thereby put a product on the market which has a total lack of adhesion between the component parts of this ladder, which can cause the ladder to fail, yet is afforded complete immunity under the interpretation of Section 11-1-63(a)(i)(1) adopted by the District Court and Court of Appeals.

Section 11-1-63(a)(i)(1), supra, grants unto each different manufacturer of any given product the legal authority to adopt whatever standards it may wish for the manufacture of its product. A given manufacturer may select a high standard of quality or a low standard of quality. So long as a manufacturer meets even the lowest of standards selected by it, the District Court's ruling has the effect of holding that, so long as the product meets the standards arbitrarily selected by each manufacturer, the product cannot be defective as a matter of law.

This causes obvious unequal results to occur. If manufacturer A adopts a breaking standard of 100 pounds per square inch (psi) for its ladder and a particular ladder fails at 75 psi then manufacturer A is liable. However, should manufacturer B select a breaking standard of 50 psi for its ladder and its ladder breaks at 75 psi, manufacturer B is not

liable as a matter of law under the District Court's and Court of Appeals' ruling.

At trial, the expert witness and corporate representative for Louisville Ladder testified that Louisville Ladder did not even have any manufacturing specifications which related to a standard for the proper bonding to be obtained between the fiberglass portions and resin portions of its ladders. Thus by not adopting any standard at all, Louisville Ladder has been allowed to place a defective product on the market and Louisville Ladder is immune so long as the ladder does not fail its own arbitrarily selected ANSI standards.

The unequal results seen in a comparison of the 100 psi ladder made by manufacturer A and the 50 psi ladder made by manufacturer B undeniably results in a denial of equal protection under the law.

Amendment 14 to the United States Constitution provides, inter alia, that Mississippi shall not, "deny to any person within its jurisdiction equal protection of the laws."

Obviously, Section 11-1-63, supra, causes a consumer who purchases a ladder manufactured by manufacturer B (i.e. 50 psi) to receive less than the same protection under the law as a consumer who purchased a ladder from manufacturer A (i.e. 100 psi). A different set of legal standards is being applied to each consumer depending upon the legal standard or specifications arbitrarily selected by any given manufacturer.

In Sweatt v. Murphy, 733 So.2d 207 (Miss. 1999), the Mississippi Supreme Court overruled an interpretation of the Mississippi Residential Landlord and Tenant Act, Section 89-

81, et seq., Miss. Code Ann. (1972, as amended), which would have resulted in unequal results and unequal protection of the law, stating:

> One commentator, in discussing the concurring opinion in O'Cain interpreted the opinion as a positive step away from a scheme under which standards of habitability are determined pursuant to housing codes, which may differ from one municipality to another.

University of Mississippi law professor Deborah Bell writes that:

> General obligations to repair, or warranties of habitability, are imposed as a matter of public policy; courts, or legislatures, have determined that residential tenants should be afforded a minimum standards of habitability in their homes. The policy applies equally to all tenants, and should not be tied to the chance decision of the municipality to enact a housing code. The better approach to general maintenance obligations and a state checkerboarded with codes is a general standard of minimum habitability with reference to available codes as a guideline. (Emphasis by this writer)

Thus, the Mississippi Supreme Court has stated that it will not allow a "checkerboard" pattern of codes which result in unequal results dependent upon which code is adopted by which municipality.

Yet Section 11-1-63(a)(i)(1), supra, on its face allows manufacturers to adopt different and varying standards for the manufacture of their particular products and thereby create a "state checkerboarded" with different manufacturing standards each of which become the law of each individual case.

Under Section 11-1-63(a)(i)(1) a consumer who purchases a ladder manufactured by manufacturer B is not receiving the same equal protection of the law as a consumer who purchases a ladder from manufacturer A. A different set of legal standards is being applied according to the standards the manufacturing selected by any given manufacturer.

Article 4, Section 88, of the Mississippi Constitution of 1892 provides that the Mississippi Legislature shall pass only general laws and shall not pass private laws. Section 11-1-63(a)(1)(i) is obviously a private law since, depending upon the standards selected by any given manufacturer, its product will be judged by a different set of standards with different results for different consumers.

Section 11-1-63(a)(i)(1), supra, also allows each manufacturer to legislate the legal standards by which its product will be judged. This unlawful delegation of power is in direct violation of Article 4, Section 33, of the Mississippi Constitution of 1892 which provides that the legislative power of the State of Mississippi is only vested in the Legislature. Certainly granting the power to adopt and set the legal standards by which products are judged is a grant of legislative power to individual manufacturers which cannot be allowed.

Article 4, Section 90, of the Mississippi Constitution further provides that the Mississippi Legislature shall not pass

local, private or special laws. Under Section 11-1-63(a)(i)(1) if a manufacturer does not manufacture its product up to governmental standards, it is not necessarily liable, while if it manufactures its product to its own arbitrarily selected standards, it is immune from liability. This amounts to private law and is a denial of due process and equal protection under the law and is an unlawful delegation of the legislative power of the state. The Mississippi Legislature is not free to delegate its lawmaking authorities even to other branches of the government, Alcorn v. Hamer, 38 Miss. 652 much less to private manufacturing concerns.

CONCLUSION

Section 11-1-63(a)(1)(i) Miss. Code Ann. (1972, as amended) is an unlawful delegation of the legislative power of the State to private manufacturers. It allows the creation of a checkerboard pattern of standards resulting in denial of due process and equal protection under the laws to the ultimate users of consumer products.

It grants unto each individual manufacturer a power not possessed by the State of Mississippi nor possessed by the United States of America, i.e. the power to set absolute standards by which the defectiveness of its product will be judged in court.

The Petition for Writ of Certiorari should be granted. Otherwise, consumers in Mississippi will continue to suffer from a denial of equal protection and a denial of due process by manufacturers being allowed to create private legislation. This denies injured consumers access to and recourse in the courts of the State of Mississippi and the United States and as such is unconstitutional.

Both the District Court and the Fifth Circuit Court of Appeals sidestepped this issue. Hopefully, this Court will address the issue as similar statutes have been adopted in states other than Mississippi.

Respectfully submitted,

MILTON LEE LEVERETTE

/s/ _____
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed July 9, 1999]

No. 98-60488

MILTON LEE LEVERETTE, *Plaintiff-Appellant,*	)
v.	)
LOUISVILLE LADDER COMPANY *Defendant-Appellee.*	)

Appeal from the United States District Court
For the Southern District of Mississippi
(5:97-CV-58-Br-S)

Before DAVIS, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Milton Lee Leverette brought suit against Louisville Ladder Company asserting that manufacturing defects were responsible for injuries suffered in a work-related fall. The district court, excluding Leverette's expert's testimony, granted Louisville Ladder's Motion for Judgment as a Matter of Law. Leverette appeals. We AFFIRM.

I. FACTS AND PROCEEDINGS

In March, 1995, Milton Lee Leverette was working for Vicksburg Video as a cable installer and technician. As a part of his work duties, Leverette used a 28-foot fiberglass extension ladder to check and install cable on utility poles. While working on March 25, 1995, Leverette placed his ladder against the utility pole to check the cable of one of his customers. As he reached the third rung from the top, the ladder broke in half, and Leverette fell approximately 30 feet to the ground. Leverette suffered severe injuries to his shoulder, back, and abdomen, requiring two surgeries.

Leverette filed a complaint against the manufacturer of the ladder, Louisville Ladder Company, under the Mississippi Product Liability Act ("MPLA") alleging that he suffered severe personal injuries as a result of a manufacturing defect. Leverette enlisted the assistance of Dr. Shelby Thames, a professor of chemistry and polymer sciences at the University of Southern Mississippi. Upon completion of the discovery deposition of Dr. Thames, Louisville Ladder filed a Motion for Summary Judgment and further, filed a Motion to Exclude the testimony of Dr. Thames pursuant to *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The district court denied both Motions. Louisville Ladder also moved to strike Dr. Thames' testimony on the ground that

Leverette failed to produce a list of the cases that its expert had testified in the past four years and the amount that they were paying Dr. Thames, pursuant to Fed. R. Civ. P. 26. The district court ordered Leverette to produce the expert information within five days.

Prior to trial, Louisville Ladder renewed its *Daubert* motion and requested the court to strike Dr. Thames' testimony because the Rule 26 expert information was not provided.

At trial, Leverette called Dr. Thames who opined that the ladder had a manufacturing defect because there was no adhesion between the fiberglass and the polymer matrix making up the ladder. At the conclusion of Dr. Thames' testimony, the district court ruled that Dr. Thames' testimony was irrelevant and excluded his testimony. The district court subsequently granted Louisville Ladder's Motion for Judgment as a Matter of Law under Fed. R. Civ. P. 50.

II. DISCUSSION

We review the district court's decision to grant a Motion for Judgment as a Matter of Law *de novo*. *See Garcia v. Woman's Hosp. of Texas*, 97 F.3d 810, 812 (5th Cir. 1996). We consider all the evidence in the light and with all inferences most favorable to the party opposed to the motion. *See Ikerd v. Blair*, 101 F.3d 430, 432 (5th Cir. 1996). We review the district court's decision to exclude expert testimony for an abuse of discretion. *See General Electric Co. v. Joiner*, 118 S. Ct. 512, 517 (1997); *Moore v. Ashland Chemical Inc.*, 151 F.3d 269, 274 (5th Cir. 1998) .

Leverette contends that the district court abused its discretion in excluding Dr. Thames' testimony on the ladder's manufacturing defect. The district court, relying on *Daubert*, Fed. R. Evid. 702, and Fed. R. Evid. 703, excluded the testimony, ruling that the testimony was irrelevant to proving that the ladder had a manufacturing defect. We hold that the district court did not abuse its discretion in excluding the expert's testimony for a lack of relevance.

To prevail in a products liability case under Mississippi law, the plaintiff must prove, at the time the product left control of the manufacturer or seller, "[t]he product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications. . . ." Miss. Code. Ann. § 11-1-63 (a) (i) (1).

Louisville Ladder manufactures its ladders to meet specifications under the American Natienal Standard Institute ("ANSI"). The ANSI standards provide a set of minimum performance and dimensional requirements for the manufacture of products. ANSI A14.5 specifies materials to be used in manufacturing, the properties of the materials, the types ef tests to be performed, and minimum test results. Further, the ANSI relies on the American Society of Testing and Materials ("ASTM") for performing strength, physical, and mechanical property tests for fiberglass.

The district court ruled, and we agree, that Dr. Thames failed to assess whether the ladder met ANSI standards in accordance with the requirements under Mississippi law. The district court did not abuse its discretion.

Leverette now contends that this Court should apply a risk-utility analysis to the ladder under *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss. 1993) to find that it was a defective product. The risk-utility analysis applies to design defects case, not manufacturing defect cases. *See* Miss. Code. Ann. § 11-1-63(a) (i) (1), (b). "The Court will not allow a party to raise an issue for the first time on appeal merely because a party believes that he might prevail if given the opportunity to try a case again on a different theory." *See Forbush v. J.C. Penney Co.*, 98 F.3d 817, 822 (5th Cir. 1996). Leverette did not assert a design defect theory and cannot present this issue on appeal.

Finally, Leverette contends that the district court should have considered his Motion for Reconsideration to challenge the constitutionality of the MPLA. This Court will not consider an issue that a party fails to raise in the district court absent extraordinary circumstances, *see North Alamo Water Supply Corp. v. City of San Juan Texas*, 90 F.3d 910, 916 (5th Cir. 1996) (declining to consider constitutional challenge to statute on appeal), and generally speaking, we will not consider an issue raised for the first time in a Motion for Reconsideration. *See Browning v. Navarro*, 894 F.2d 99, 100 (5th Cir. 1990).

III. CONCLUSION

For the foregoing reasons, the district court's opinion is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

[Filed July 17, 1998]

No. 5:97cv58BrS

MILTON LEE LEVERETTE)
Plaintiff)
)
v.)
)
LOUISVILLE LADDER CO., INC.)
Defendant)
)

JUDGMENT
Entered: July 15, 1998

This matter was tried before the Court on June 8 and 9, 1998. The Court, after considering the evidence and law in this case, granted defendant's Motion for a Judgment as a Matter of Law and dismissed Milton Leverette's case;

IT IS ORDERED ADJUDGED AND DECREED that there be Judgment in favor of defendant, Louisville Ladder Corp., and against plaintiff, Milton Lee Leverette, dismissing said plaintiff's Complaint with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs associated with this matter are to be taxed to the plaintiff.

Natchez, Mississippi, this 15th day of July, 1998.

/s/_____
Judge, David Bramlette

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed September 3, 1999]

No. 98-60488

MILTON LEE LEVERETTE
Plaintiff - Appellant

v.

LOUISVILLE LADDER CO, INC.
Defendant - Appellee

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING

Before DAVIS, DUHÉ and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

REHG- 2

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI WESTERN DIVISION

[Filed June 11, 1998]

No. 5:97cv58BrS

MILTON LEE LEVERETTE *Plaintiff*	)
v.	)
LOUISVILLE LADDER CO., INC. *Defendants*	)

MOTION FOR RECONSIDERATION

COMES NOW Milton Lee Leverette, through counsel, and prior to entry of this Court's Judgment on its Order excluding the evidence and testimony of Dr. Shelby Thames and prior to entry of its Rule 50 Judgment, files this his Motion for Reconsideration so as to allow this Court to consider and pass upon the following, to-wit:

I.

That §13-1-63(a) (i) (1) Miss. Code Ann. (1972, as amended) is unconstitutional.

II.

Article 4, §88 of the Mississippi Constitution of 1892 provides that the legislature shall pass general laws as opposed to private laws.

III.

Article 4, §90 of the Mississippi Constitution of 1892 provides that the legislature shall not pass local, private or special laws.

IV.

Article 4, §33 of the Mississippi Constitution of 1892 provides that the legislative power of the State of Mississippi shall be vested in the legislature.

V.

The Mississippi legislature cannot delegate to the whole of the people or any portion of the people, or to any other department of the government, its powers to make laws. Alcorn v. Hamer, 38 Miss. 652.

VI.

That §11-1-63 (a) (i) (1) amounts to a private law in that each individual manufacturer of any given product is allowed to set its own unique specifications for the manufacture of its product. Said Code Section then allows such manufacturer's specifications to become the standard by which each manufacturer's product is measured and/or judged regarding whether or not said product constitutes a defective product or an unsafe product and thereby allows each individual manufacturer's unique standards to become the "law of the case" and "private law."

VII.

That because §11-1-63 (a) (i) (1) allows each individual manufacturer to establish private law and to provide for unequal standards for any given manufacturer, same is unconstitutional.

VIII.

That allowing different and individual manufacturers to decide which different specifications to which they will manufacture their product and then allowing said products to be judged by the peculiar standards selected by any given manufacturer amounts to a denial of due process of law under the Constitution of 1892 and the United States Constitution.

IX.

That the aforesaid §11-1-63 (a) (i) (1) amounts to an unlawful delegation of the legislative powers of the State of Mississippi to private manufacturers and entities in violation of Article 1, Section 2 and Article 4, Section 33 of the Mississippi Constitution of 1892.

X.

That for each and all of the aforesaid reasons, §11-1-63(a) (i) (1) is unconstitutional and should be declared void and unconstitutional by this Court and this Court's Order excluding the testimony of Dr. Shelby Thames and entering its Rule 50 Judgment should be reconsidered and set aside.

Respectfully submitted,

/s/_____
DAVID M. SESSUMS, Attorney for
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APPENDIX E

MISSISSIPPI CODE ANN. (1972, AS AMENDED)

§ 11-1-63. Product liability actions; conditions for liability; what constitutes defective product.

In any action for damages caused by a product except for commercial damage to the product itself:

(a) The manufacturer or seller of the product shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:

(i)1. The product was defective because it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured to the same manufacturing specifications, or

2. The product was defective because it failed to contain adequate warnings or instructions, or

3. The product was designed in a defective manner, or

4. The product breached an express warranty or failed to conform to other express factual representations upon which the claimant jnstifiably relied in electing to use the product; and

(ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and

(iii) The defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

(b) A product is not defective in design or formulation if the harm for which the claimant seeks to recover compensatory damages was caused by an inherent characteristic of the product which is a generic aspect of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community.

(c)(i) In any action alleging that a product is defective because it failed to contain adequate warnings or instructions pursuant to paragraph (a)(i)2 of this section, the manufacturer or seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller, the manufacturer or seller knew or in light of reasonably available knowledge should have known about the danger that caused the damage for which recovery is sought and that the ordinary user or consumer would not realize its dangerous condition.

(ii) An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates sufficient information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to an ordinary consumer who purchases the product; or in the case of a prescription drug, medical device or other product that is intended to be used only under the supervision of a physician or other licensed professional person, taking into account the characteristics of, and the ordinary knowledge common to, a physician or other licensed professional who prescribes the drug, device or other product.

(d) In any action alleging that a product is defective pursuant to paragraph (a) of this section, the manufacturer or

seller shall not be liable if the claimant (i) had knowledge of a condition of the product that was inconsistent with his safety; (ii) appreciated the danger in the condition; and (iii) deliberately and voluntarily chose to expose himself to the danger in such a manner to register assent on the continuance of the dangerous condition.

(e) in any action alleging that a product is defective pursuant to paragraph (a)(i)2 of this section, the manufacturer or seller shall not be liable if the danger posed by the product is known or is open and obvious to the user or consumer of the product, or should have been known or open and obvious to the user or consumer of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product.

(f) In any action alleging that a product is defective because of its design pursuant to paragraph (a)(i)3 of this section, the manufacturer or product seller shall not be liable if the claimant does not prove by the preponderance of the evidence that at the time the product left the control of the manufacturer or seller:

(i) The manufacturer or seller knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger that caused the damage for which recovery is sought; and

(ii) The product failed to function as expected and there existed a feasible design alternative that would have to a reasonable probability prevented the harm. A feasible design alternative is a design that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers.

(g)(i) The manufacturer of a product who is found liable for a defective product pursuant to subsection (a) shall

indemnify a product seller for the costs of litigation, any reasonable expenses, reasonable attorney's fees and any damages awarded by the trier of fact unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same; or the seller made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.

(ii) Subparagraph (i) shall not apply unless the seller has given prompt notice of the suit to the manufacturer within thirty (30) days of the filing of the complaint against the seller.

(h) Nothing in this section shall be construed to eliminate any common law defense to an action for damages caused by a product.

SOURCES: Laws, 1993, ch. 302, § 1, eff from and after July 1, 1993.